The General Tire & Rubber Company *and* Local No. 496 of International Union Allied Industrial Workers of America, AFL-CIO. Case 26-CA-8205

July 23, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 28, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent also filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as clarified below, and to adopt his recommended Order.

Respondent argues in its brief that it discharged the 37 probationary employees solely for legitimate and substantial business considerations; i.e., lack of work resulting from the large inventory which Respondent had built up in anticipation of a strike. In support of its position, Respondent contends that its decision to terminate the probationary employees was made prior to the employees' decision to strike and during the period in which Respondent had reached a tentative agreement, later rejected by the rank and file, with the union bargaining committee. Respondent further argues that its discharge of the probationary employees was fully in accord with the provisions of the collective-bargaining agreement which, under Respondent's interpretation, provides that new employees may be terminated for losing any time, for any reasons, during their 60-day probationary period.

We believe that the Administrative Law Judge properly rejected these arguments as insufficient under the standard set forth in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and recently applied by the Board in *Freezer Queen Foods, Inc.*, 249 NLRB 330 (1980).

In *Great Dane, supra*, the Supreme Court held that employer conduct which was "inherently destructive" of Section 7 employee rights "bears its own indicia of intent" and requires no proof of antiunion motivation for a finding of an unfair labor practice. *Id.* at 33-34. Under such circumstances, the Board may find a violation even where the employer introduces evidence that its conduct was motivated by legitimate business considerations. *Id.* However, where "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.* at 34.

Despite Respondent's multiple and shifting defenses, the record in this case clearly establishes that Respondent was not motivated by any legitimate and substantial business concerns in discharging the probationary employees who honored the union picket line.

First, we note that Respondent continued to operate its plant during the strike and its own witnesses testified that work was available at that time for approximately 100 employees. Only four permanent employees and four probationary employees crossed the picket line and returned to work. Indeed, Respondent stated that its delay in the mailing of the termination notices was occasioned by the fact that the strike had forced clerical employees to work in the factory and prevented them from engaging in their regular duties. Respondent's own witnesses thus contradicted its assertion that the probationary employees were discharged solely for lack of work.

Second, we note that Respondent did not terminate *all* probationary employees. Instead, Respondent terminated only those probationary employees who observed the union picket line. The only distinction between the probationary employees who were discharged and the probationary employees who were retained was that the former were engaged in the protected activity of honoring the strike, whereas, the latter were not, and any decision based on such a distinction is inherently destructive of employee rights under the Act.

Lastly, Respondent's argument that its conduct was sanctioned by the language of its collective-bargaining agreement, which Respondent interprets as allowing the discharge of probationary employees who are absent from work because of a lawful strike, must be rejected as inconsistent with the rights granted to those employees under Section 7 and protected by Section 8(a)(1) and (3) of the Act. See *Freezer Queen Foods, Inc., supra.*

Accordingly, we are in full agreement with the Administrative Law Judge's findings and conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its probationary employees who honored the strike and by thereafter refusing to reinstate them.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The General Tire & Rubber Company, Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall take the actions set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard before me on June 9 and 10, 1980, in Fort Smith, Arkansas. The charge was filed on December 19, 1979, and amended on January 23, 1980. The complaint issued on February 12, 1980, alleges violations of Section 8(a)(1) and (3) of the Act. It is alleged that The General Tire & Rubber Company (herein Respondent) violated Section 8(a)(1) by threatening an employee that Respondent would terminate probationary employees who honored the Union's picket line. The complaint also alleges that Respondent discharged 37 employees during the existence of an economic strike in violation of Section 8(a)(1) and (3) of the Act.

Upon the entire record, my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I hereby make the following:

FINDINGS[1]

A. *The Alleged Discharges*

General Counsel alleges that Respondent violated the Act by discharging 37 probationary employees because of their involvement in an economic strike.

The evidence demonstrates that Respondent and Local No. 496 of International Union Allied Industrial Workers of America, AFL-CIO (herein the Union, or the Charging Party), were parties to several collective-bargaining agreements from the years prior to 1979. Pre-1979 contracts were negotiated and executed several months before the preceding agreement was set to expire. Those early negotiations prevented Respondent from having to build a "strike bank." Uncontested evidence proved that Respondent was required, by its customers, to build an inventory immediately before the expiration of Respondent's collective-bargaining agreements for the purpose of being able to continue to supply those customers in the event of a strike—the so-called "strike bank."

Even though, before 1979, Respondent had been able to avoid building a strike bank through successful early negotiations, in 1979 the Union did not agree to engage in early negotiations pursuant to requests made by Respondent. Therefore, since the collective-bargaining agreement was set to expire on November 1, 1979, Respondent started beefing up its work force in early September for the purpose of establishing a strike bank. In accordance with the contract provisions, those employees became probationary employees.[2]

Respondent was successful in substantially establishing its "strike bank" by the end of October 1979. In anticipation of the Union agreeing to a contract,[3] Respondent, during October 31 and November 1, 1979, prepared "change of status" notices which were to serve as termination notices to all of its probationary employees and layoff notices to a substantial number of its permanent employees.[4]

Respondent points out that completion of the strike bank resulted in a lack of work necessitating the discharges and layoffs.

However, before Respondent effectuated the terminations and layoffs, it was notified on November 1 that the employees had rejected ratification of the proposed contract and were commencing a strike.[5] No further action was taken at that time to notify any employees that they were either terminated or laid off because of lack of work.

Shortly after the strike commenced on November 1, eight employees—including four permanent employees[6] and four probationary employees—crossed the picket line and reported to work. Those eight employees were permitted to work.

Around November 9, two more probationary employees[7] offered to return to work. Respondent advised those employees that they could not return to work.

Respondent did not hire any new employees after the strike commenced.

On November 12 or 13, Respondent mailed the change of status notices, which it had prepared on October 31 through November 1, to all the probationary employees[8]

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[1] Neither the allegations regarding commerce nor the status of the Charging Party is in dispute. The complaint alleged, Respondent admitted, and I find that at all material times herein, Respondent at its place of business located in Fort Smith, Arkansas, where it is engaged in the manufacture of gaskets, annually sold and shipped from that Fort Smith facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Arkansas and annually purchased and received at its Fort Smith facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Arkansas. Respondent admitted and I find that, at all times material herein, it was an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The complaint alleged, Respondent admitted, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Sec. 2(5) of the Act.

[2] The contract, which expired on November 1, 1979, provided a 60-day probationary period for new hires.

[3] Respondent was advised by the negotiating committee that they were going to recommend ratification of the proposed contract to the employees.

[4] Respondent's policy was to terminate rather than lay off probationary employees. Therefore, rehired probationary employees were treated as new hires except in instances where a probationary employee was rehired within 30 days. The contract provided that probationary employees discharged due to lack of work would, when rehired within 30 days of their discharge, be credited with all days worked from their original date of hire.

[5] The parties stipulated that the strike occurred because of the employees' failure to ratify the contract.

[6] Permanent employees—those not in their probationary period, were usually referred to as "regular" employees.

[7] Only one such employee, Danny Farrar, was identified by name.

[8] However, no permanent (regular) employees were notified of a layoff during the existence of the strike. The layoff notices prepared during the

Continued

other than the four probationary employees who had continued to work during the strike. Respondent thereby discharged 37 probationary employees.[9] The terminations were retroactive to November 2, 1979.

The strike eventually ended when the parties agreed upon a collective-bargaining agreement in December 1979. When the strike ended, the four probationary employees who worked during the strike had, by virtue of their continuing to work, completed their required 60-day probationary period and had become permanent employees.

During the first week after the strike ended Respondent recalled striking employees on an "as-need basis" without regard to seniority. Thereafter, striking employees were recalled on the basis of seniority.[10] Because of their seniority, the four former probationary employees who had worked during the strike were laid off 1 week after the strike ended, due to lack of work.[11]

Conclusions

The Board recently considered a question similar to the one presented here, in the case of *Freezer Queen Foods, Inc.*, 249 NLRB 330 (1980). In reaching its decision in *Freezer Queen*, the Board applied tests from *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). The Board found that the administrative law judge was correct in concluding that the respondent in *Freezer Queen* coerced and discriminated against striking probationary employees. However, the Board indicated it was also necessary under *Great Dane supra* to consider whether the employer had proffered "a substantial and legitimate business end" as justification for its actions.

I have determined that Respondent's actions herein had the effect of coercing and discriminating against striking probationary employees. The facts amply demonstrate that Respondent's actions in discharging the probationary employees were inherently destructive of Section 7 rights.

Even though change of status forms were prepared before the strike, those forms were prepared with a mind toward discharging all 41 probationary employees and laying off a number of permanent employees. However, that fact was not conveyed to any of the employees until after the strike commenced—around November 12 or 13 when 37 probationary employees were actually terminated.

Respondent pointed out that its failure to notify the probationary employees of their discharge was merely an oversight caused by the chaos resulting from the sudden strike. However, in that regard I note that the four probationary employees[12] who crossed the picket line and continued to work from the strike's inception were never terminated.[13] Therefore, only those 37 probationary employees who honored the picket line were terminated on November 12 or 13.

Moreover, two probationary employees who had been honoring the picket line sought authority to return to work around November 9. Those two employees were advised that they could not return to work.

Therefore, the circumstances lead to the inescapable conclusion that the 37 probationary employees were notified of their termination around November 12 or 13, because they observed the picket line and engaged in the strike from its inception.

Secondly, in accord with the Board's mandate in *Freezer Queen Foods*, I shall consider whether Respondent "proffered 'a substantial and legitimate business end' as justification for its actions." In that regard, evidence reflected that Respondent determined to go ahead and mail the change of status forms notifying the 37 employees of their termination around November 12 or 13, because it came to its attention that those employees were being deprived of an opportunity to collect unemployment compensation benefits.[14]

Additionally, Respondent, in its brief, argues that the 37 probationary employees were actually terminated pursuant to its prestrike (October 31 and November 1) decision. Respondent contends that decision was based solely on there being insufficient work to continue employing the probationary employees. However, I find that argument is not supported by the facts. It is true enough that on October 31 Respondent anticipated terminating several employees, including all the probationary employees, due to lack of work. However, those employees were not terminated at that time. The strike ensued. Following the strike, there was work available and those employees, including probationary employees, who did not observe the strike continued their employment. Therefore, when the decision to terminate the remaining probationary employees was finally effected on November 12 or 13, the former nondiscriminatory basis for Respondent's actions no longer existed.

Respondent also points out that by missing work following the November 1 strike, those employees breached a condition of their probation and were, therefore, terminated. In that regard, Respondent points to contractual language indicating the probationary period "must be a continuous period on the active payroll," and points out that its policy was to terminate probationary employees who lost time for any reason. That argument was similar to the one argued in *Freezer Queen Foods, supra*, where it was rejected by the Board. A different holding would place probationary employees in the untenable position of being unable to participate in a strike without risk to their employment status.

October 31 through November 1 period for permanent employees were destroyed and never mailed to any of the permanent employees.

[9] Respondent's former industrial relations manager testified that Respondent went ahead and terminated those 37 probationary employees in order to permit them to receive unemployment compensation benefits.

[10] There is no allegation of unlawful conduct regarding the recall of strikers.

[11] The layoff of those four former probationary employees is not alleged as a violation.

[12] Those employees were Benjamin Jones, Robert McClury, Debra Long, and Timothy Wilkerson.

[13] Those employees (fn. 12, *supra*) were laid off 1 week after the strike ended because of lack of sufficient work and because of their short term seniority. One, Debra Long, continues to be classified as a "regular" employee. The other three have since voluntarily terminated their employment.

[14] However, no similar justification was offered to justify Respondent's refusal to permit two probationary employees from returning to work around November 9.

I find that the evidence does not establish that Respondent based the discharges on substantial and legitimate business ends which would justify action, which is inherently destructive of Section 7 rights.[15]

Therefore, having found that Respondent has failed to establish a legitimate and substantial business objective for its conduct, and having found that such conduct coerced and discriminated against striking probationary employees, I hereby find that Respondent violated Section 8(a)(1) and (3) of the Act by terminating 37 probationary employees on or about November 12 or 13, 1979.[16]

B. *The Alleged 8(a)(1) Violation*

Peggy Hicks testified that she is employed by Temporary Employment Company of Fort Smith. During September or October 1979, while employed by Temporary Employment, she was assigned to Respondent to perform clerical duties in the purchasing office. According to Hicks, she was at Respondent for 8 days.

Hicks testified that approximately a week before the strike at Respondent, she asked Lynn Simmerman[17] if "a person on probation, if they refused to walk across the picket line, what would happen to them?" According to Hicks, Simmerman immediately answered, "They would be fired, period."

Lynn Simmerman denied that she had such a conversation. Moreover, Simmerman testified that the term "fired" is one that she is careful not to use—instead she would say either "terminated" or "discharged." However, according to Simmerman, she used none of those terms with Hicks. In fact, she testified that she never discussed probationary employees with Hicks.

Peggy Hicks testified that another person—Debbie Rogers, the purchasing clerk—was present during her conversation with Simmerman. However, Rogers was not called to testify.

I was impressed with the testimony of Lynn Simmerman. She was originally called as a 611(c) witness by General Counsel. It appeared to me that she endeavored to answer General Counsel's questions candidly. Therefore, I find that I am unable to discredit her denial of the alleged 8(a)(1) conversation. On that basis, I find that General Counsel has not proved that Respondent violated Section 8(a)(1) as alleged.

CONCLUSIONS OF LAW

1. Respondent, The General Tire & Rubber Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 496 of International Union Allied Industrial Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by discharging and thereafter refusing to reinstate[18] its employees named in Appendix A (attached hereto) because of its employees' strike activities, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. Respondent did not violate Section 8(a)(1) of the Act by threatening an employee that Respondent would terminate probationary employees who honored the Union's picket line.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative actions designed to effectuate the policies of the Act. My recommended order will require Respondent to offer the employees named in Appendix A reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.[19] I shall further recommend that Respondent be ordered to make the employees listed in Appendix A herein, whole for any loss of earnings they may have suffered as a result of the discrimination against them from the time of their discharge,[20] and that it post appropriate notices. Loss of backpay should be computed and interest thereon shall be added in the manner proscribed in *F. W. Woolworth Company*, 90 NLRB 289, (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[21]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

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[15] See *Freezer Queen Foods, Inc., supra; N.L.R.B.* v. *Great Dane Trailers, Inc., supra; National Seal, Division of Federal-Mogul Bower Bearings, Inc.*, 141 NLRB 661 (1963), enforcement denied 336 F.2d 781 (9th Cir. 1964).

[16] Respondent offered evidence that probationary employees beginning with the hiring of employee Karen Slavens around October 1, 1979, were told during their employment interview that the work was temporary. In view of the events that followed and the fact that the collective-bargaining agreement did not provide for "temporary employees," I have determined that Respondent's advice that the work was temporary to those employees does not affect my decision herein. Respondent treated all those employees as probationary employees, and there was no evidence which demonstrated that any of those employees would not have been permitted to continue working if they had ignored the November 1 strike.

[17] In its brief, Respondent admitted Simmerman was a supervisor. However, Respondent contended that Simmerman's supervisory authority was limited to the interviewing and hiring of new employees. The evidence supports Respondent's position in that regard.

[18] In view of the evidence indicating that at the time of the hearing Respondent, because of insufficient work, had not reinstated all of its permanent employees following the November 1979 strike, it would, of course, not be necessary, and Respondent would not be justified on the basis of this Order, to actually reinstate any of the discriminatees herein out of order of their seniority.

[19] In that regard, see fn. 18, *supra*. If necessary, it may be determined in compliance proceedings whether any or all of the 37 discriminatees herein would, on the basis of factors not violative of the Act, be in a layoff status. If so, Respondent in lieu of reinstatement, should be required to place those particular discriminatees on a recall list without prejudice to their seniority or other rights and privileges.

[20] *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979). Backpay, which should run from November 9 for the two employees that attempted to return on that date and from November 12 or 13 for the remaining 35 employees, would be tolled during periods when the employees would be laid off for reasons not violative of the Act.

[21] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[22]

The Respondent, The General Tire & Rubber Company, Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees and refusing to reinstate them because of their strike activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Offer to the employees listed on Appendix A herein immediate and full reinstatement to their former jobs or, if those job no longer exist, to a substantially equivalent positions, without prejudice to their seniority or other rights and privileges; or if those employees would, because of factors not violative of the Act, be in a layoff status, to positions of recall, without prejudice to their seniority or other rights and privileges.

(b) Make the employees named in Appendix A herein whole for any loss of pay they may have suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to aid in the determination of the amount of backpay due under the terms of this Order.

(d) Post at its Fort Smith, Arkansas, facility copies of the attached notice, marked "Appendix B."[23] Copies of said notice, on forms provided by the Regional Director for Region 26, shall be duly signed by Respondent's authorized representative and posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous, places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director of Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith.

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Sherman Hicks	Joy Willhite
Connie Hobson	Carol Mayes
Sharon Mailand	Carol Harris
Bonnie Brown	Danny Farrar
Sharon Marr	Deborah Dodson
Willie Russell	Sandra Barnett
Viola Coble	Patricia Tompkins
Ronald L. North	Richard Griffin
Terry Bradberry	Ronald Lucas
Lisha Lee	Evelyn Lucille Austin
Betty Spears	Terry Turner
Willa Lucas	Karen Slavens
Elizabeth Atchley	Janice Roberts
Carmen Johnson	Carl Wise
Ruby M. Poole	Michael Warren
Elizabeth Foster	Lisa Horn
Glenda Roberts	Billy Sattazahn
Randy Martin	Gilberta Dominguez
Betty Rogers	

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge our employees because they engage in strike activity on behalf of Local No. 496 of International Union Allied Industrial Workers of America, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to:

Sherman Hicks	Sandra Barnett
Connie Hobson	Patricia Tompkins
Sharon Mailand	Richard Griffin
Bonnie Brown	Ronald Lucas
Sharon Marr	Evelyn Lucille Austin
Willie Russell	Terry Turner
Viola Coble	Karen Slavens
Ronald L. North	Janice Roberts
Terry Bradberry	Carl Wise
Lisha Lee	Michael Warren
Betty Spears	Lisa Horn
Willa Lucas	Billy Sattazahn
Elizabeth Atchley	Gilberta Dominguez
Carmen Johnson	Joy Willhite
Ruby M. Poole	Carol Mayes
Elizabeth Foster	Carol Harris
Glenda Roberts	Danny Farrar
Randy Martin	Deborah Dodson
Betty Rogers	

to their former jobs or, if their jobs no longer exists, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges; or if they would be in a layoff status due to factors not violative of the National Labor Relations Act, be

placed in line for reinstatement, without prejudice to their seniority or other rights and privileges.

WE WILL make whole the above-named employees for any loss they may have suffered by reason of our discrimination against them, with interest.

THE GENERAL TIRE & RUBBER COMPANY